PD-0038-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/17/2018 10:23 PM
Accepted 7/18/2018 10:28 AM
DEANA WILLIAMSON
CLERK

PD-0038-18

FILED
COURT OF CRIMINAL APPEALS
7/18/2018
DEANA WILLIAMSON, CLERK

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

****

CODY DARUS FRENCH

Petitioner-Appellant,

v.

THE STATE OF TEXAS

Respondent-Appellee.

****

APPEAL ON PETITION FOR DISCRETIONARY REVIEW IN CAUSE NUMBER 11-14-284-CR ELEVENTH COURT OF APPEALS, AND IN CAUSE NUMBER 10940-D FROM THE 350th DISTRICT COURT OF TAYLOR COUNTY

****

APPELLEE'S BRIEF

****

John Bennett
P.O. Box 19144
Amarillo, TX 79114
Telephone: (806) 282-4455
Fax: (806) 398-1988
Email: AppealsAttorney@gmail.com
State Bar No. 00785691
Attorney for the Appellant

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Constitutional Provision

Cases

Statute

Rule

PD-0038-18

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

****

CODY DARUS FRENCH

Petitioner-Appellant,

v.

THE STATE OF TEXAS

Respondent-Appellee.

****

APPEAL ON PETITION FOR DISCRETIONARY REVIEW IN CAUSE NUMBER 11-14-284-CR ELEVENTH COURT OF APPEALS, AND IN CAUSE NUMBER 10940-D FROM THE 350th DISTRICT COURT OF TAYLOR COUNTY

****

APPELLEE'S BRIEF

****

To the Honorable Judges of the Court of Criminal Appeals:

COMES NOW Cody Darus French, Appellant, and submits this Reply Brief in support of his request that the court of appeals' ruling be affirmed.

THE APPELLEE'S RESPONSIVE POINTS

Point One (Restated) Is the question of whether the evidence shows that a trial court and the State understood an objection a question of *fact*, making the court of appeals' decision on this angle final? And if not, even though the objection was less than perfect, are "magic words" required?

Point Two (Restated) Is the State's argument on appeal inconsistent with its trial claims, bringing into play at least the *spirit* of judicial estoppel? And is the court of appeals' detailed opinion erroneous despite the State insists – despite contrary testimony from the trial – that the evidence is "overwhelming"?

FACT STATEMENT

In addition to the State's Fact Statement, the evidence shows that before trial the State amended the indictment to add the phrase "cause contact with and penetration of the female sexual organ of" the complainant to its original charge simply of penile-anal contact or penetration. CR, p. 8, 32-3, 38. Further, the facts exist that were omitted from the State's fact section but mentioned later in its Brief. These include that to a forensic interviewer J. first said the appellant had had penile-vaginal intercourse with her, and then changed her story:

> There was one that she said that it was his private in her pee-pee, but she self-corrected. She corrected herself and said, no, it wasn't her pee-pee; it was her butt. And so she clarified that it was his private on her butt and that it hurt her butt.

RR, v. 4, p. 23. Also the complainant testified that her father "humped" her and then "wiped her *pee-pee*…" SB, p. 5 (emphasis added). The State Brief's

implicit conclusion, that the evidence of penile-*vaginal* contact or penetration is so negligible that the jury must have believed the evidence of penile-*anal* penetration, is a stretch.

And other evidence contradicts any suggestion that the evidence overwhelmingly shows contact or penetration with *either* orifice. Other testimony and evidence cast doubt on the allegation that *any* sexual activity occurred between the appellee and the complainant. This included that the complainant had previously been caught lying, RR, v. 3, p. 127-8, that her grandmother's current husband – himself a sex offender – may have sexually assaulted the child rather than the appellee, RR, v. 4, p. 132-3, and that the grandmother had previously brought forward against the appellee and others a false allegation of child molestation, RR, v. 4, p. 46-8.

SUMMARY OF THE APPELLEE'S ARGUMENTS

In Responsive Point One, the appellee respectfully directs the Court's attention to the court of appeals' conclusion that the record demonstrates that the trial court and the State understood the appellee's objection. This is a question of *fact*, and under TEX. CONST., art. V, § 6, a court of appeals' decision on this a question of fact is final. In any event, the record supports the court of appeals' opinion that the appellee's objection could have been better, but was sufficient.

In Responsive Point Two, the appellee respectfully urges that the State's position at trial on whether penile-vaginal contact or penetration was a viable theory of guilt is directly at odds with its current argument that no juror could not have voted to convict due to the evidence of penile-vaginal acts. The argument here should thus be discarded under judicial estoppel. Alternatively, the State's argument that the court of appeals erred because the evidence of penile-anal acts is overwhelming is incorrect – the court of appeals properly relied on evidence of penile-vaginal acts. And in any event, proof of *any* such abuse is questionable.

THE APPELLEE'S RESPONSIVE POINT ONE

> Is a question of whether the evidence shows a trial court and the State understood an objection a question of fact, making the court of appeals' decision on this angle final? And if not, even though the objection was less than perfect, are "magic words" required?

The State does *not* challenge the court of appeals' citation and use of the correct law. Nor does the State challenge the court of appeals' *application* of that law to the situation at hand. The State's initial challenge to the court of appeals' conclusion of sufficient preservation, (SB, p. 14-15), thus concerns solely a question of *fact*, *i.e.*, whether the record shows the trial court and parties were aware of the complaint, either in light of the specific objection or the

context in which it was made under TEX. R. APP. P. 33.1(a). And with all due respect, "the decision of" an intermediate court of appeals "shall be conclusive on all questions of fact brought before [it] on appeal or error." TEX. CONST., art. V, § 6.

The second question the State asks regarding preservation *is* a question of law: whether the appellee was legally entitled to the relief his objection sought. SB, p. 15. Yet the State's argument is confusing; it seems to distinguish between the requirement of *jury unanimity* on each charge and of the appellee's trial objection that "*you must all agree on the manner* in which the sexual assault was committed." SB, p. 12. The State's theory that the error was not preserved thus seems to turn on whether penile-vaginal – or penile-anal – contact or penetration, constitutes the *manner* in which such an offense is committed.

But jury unanimity is *precisely* what the trial prosecutor took the subject of "manner" of committing the offense to mean. In a passage quoted by the court of appeals' opinion, the trial prosecutor's identification of the two concepts is all too clear:

> …when we have the application of law to facts on page 5 where you talk about the different things that are alleged in the indictment, and the word there is "or," so you don't have to find that he contacted and penetrated the anus of the child and he contacted and penetrated the female sexual organ. You only have to find one of those. That's what the "or" means. So you can find that one of them – you know, one of you may think that he contacted the anus and another one may think

> that he penetrated the anus. You don't have to agree on that thing, as long as you all agree he did one of those things. All of those things are sexual assault in that, so you don't have to reach an agreement, a unanimous agreement, on that. So that's what that language at the bottom of that says with regard to element one, you need to not all agree on the *manner* in which the sexual assault was committed.

RR, v. 5, p. 81; court of appeals' opinion, p. 8 (emphasis added).

The State's Brief then cites *Jourdan v. State*, 428 S.W.3d 86 (Tex.Crim. App. 2014), arguing that a jury charge may require unanimity while still permitting jurors to choose among options which constitute the offense:

> the requirement of jury unanimity is not violated by a jury charge that presents the jury with the option of choosing among various alternative manner of means of committing the same statutorily defined offense.

Id. at 93; SB, p. 13. But the State Brief's reading would extend *Jourdan* far beyond both its plain language and the Court's evident intent. *Jourdan* explicitly says a charge may allow the jury to convict on alternative means and manners of committing the offense, *so long as* the instructions *also* require the jury to agree on the manner and means prompting the verdict:

> Under state law, the jury *must be unanimous in finding every constituent element of the charged offense in all criminal cases*. But the requirement of jury unanimity is not violated by a jury charge that presents the jury with the option of choosing among various alternative manner and means of committing the same statutorily defined offense.

Id. at 94 (emphasis added).

In *Jourdan* the conviction was affirmed, but due to a circumstance not present here: the Court reasoned that each juror *must* have agreed on contact,

which was one option given to convict the defendant of sexual assault, so whether some also found penetration to have occurred was irrelevant. *Id*. at 98. Here the charge dispensed with jury unanimity on which of two different orifices was contacted or penetrated. As the court of appeals recognized, this is improper.

And even if its claim might have some merit, the State Brief admits that it "is only when the nature of a defendant's complaint is *unclear* that we should consider his objection waived." *Ex parte Little*, 887 S.W.2d 62, 66 (Tex.Crim. App. 1992) (emphasis added), SB, p. 10. The State Brief firmly says the objection *was* clear. And "a specially requested charge may be defective," but "still may serve to call the court's attention to the need to charge on a defensive issue." *Williams v. State*, 630 S.W.2d 640, 643 (Tex.Crim.App. 1982).

THE APPELLEE'S RESPONSIVE POINT TWO

> Is the State's argument on appeal inconsistent with its trial claims, bringing into play at least the *spirit* of judicial estoppel? And is the court of appeals' detailed opinion erroneous despite the State insists – despite contrary testimony from the trial – that the evidence is "overwhelming"?

> …a consideration in whether to apply equitable rule of judicial estoppel "is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped[.]"

Schmidt v. State, 278 S.W.3d 353, 358, n. 9 (Tex.Crim.App. 2009), quoting *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). The State's pretrial amendment to the indictment to include penile-vaginal contact or penetration. CR, p. 8, 32-3, 38. Before trial, then, the State took pains to include the allegation of penile-vaginal intercourse. And by reading its amended indictment to the jury, the State told the jurors that sufficient evidence of at least penile-vaginal contact existed to take the matter to trial. The State then argued against confining the indictment to penile-anal sex acts, effectively telling the trial that sufficient evidence of penile-vaginal acts had been presented to present that theory to the jury. And the State incorrectly told the jurors they could mix-and-match among the theories and some could properly find that only penile-vaginal contact had occurred while others believed that only penile-anal contact had occurred, and that this was sufficient to return an aggravated assault conviction. The State then successfully obtained such a conviction.

But the State *now* takes the position that the evidence of penile-vaginal contact was so insignificant that no rational juror could have returned a verdict on a penile-vaginal theory and not on a penile-anal theory, so no harm exists. If such a turn-about does *not* constitute urging a theory utterly inconsistent with its previous one in order to wriggle out of the court of appeals' conclusion that a

new trial is warranted – and thus gain an unfair detriment – *Schmidt*, 278 S.W.3d at 358, n. 9, *New Hampshire*, 532 U.S. at 751, then one wonders what this Court and the U.S. Supreme Court in those cases could possibly have envisioned. Even if this case is deemed not to meet the requirements of judicial estoppel, the spirit of that doctrine should apply.

And the court of appeals' opinion is sound. It contains in-depth review of each of the applicable five factors. The ruling first correctly cites *Vick v. State*, 991 S.W.2d 830 (Tex.Crim.App. 1999) as holding that penile-anal acts are distinct from penile-vaginal ones under TEX. PEN. CODE Art. 22.021(a)(1)(B)(i), (iii), and (iv); (a)(2)(B). *Vick*, at 833; Opinion, p. 4. The opinion also notes exactly how the State tried the case and what the prosecutor told the jury, at voir dire and after. Opinion, p. 10-11.

The State's argument that the error is harmless is premised virtually exclusively on the State's belief that its evidence of penile-anal contact or penetration was overwhelming. SB, p. 21, 23, 27. But as the State Brief itself admits, the complainant initially testified the appellee's "private" touched, "I don't know … my, my pee-pee," SB, p. 18, although she then said "No, my butt." *Id*. And although the State Brief puts forward another explanation that does *not* involve penile-vaginal contact occurred, the complainant testified the appellee wipes her "pee-pee" after supposedly having sex acts with her. SB, p.

5. For many years the Court has held that "the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given their testimony," and that a "jury is entitled to accept one version of the facts and reject another or reject any of a witness' testimony." *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex.Crim.App. [Panel op.] 1981).

And as was noted in the appellant's brief below, other testimony puts on doubt the State's allegations from the start. The complainant had previously been caught lying, RR, v. 3, p. 127-8, that her grandmother's current husband – a sex offender – may have sexually assaulted her rather than the appellee, RR, v. 4, p. 132-3, and that the grandmother had previously brought forward against the appellee and others a false allegation of child molestation. RR, v. 4, p. 46-8.

PRAYER FOR RELIEF

The appellant thus prays the Court affirm the court of appeals' opinion.

Respectfully submitted,

/s/ JOHN BENNETT
John Bennett
Post Office Box 19144
Amarillo, Texas 79114
Telephone: (806) 282-4455
Fax: (806) 398-1988
Email: AppealsAttorney@gmail.com
State Bar No. 00785691
Attorney for the Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that this entire brief contains 2,681 words.

/s/ JOHN BENNETT
John Bennett

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above Appellant's Brief has been served by the "efile Texas" system on the Taylor County District Attorney and the State Prosecuting Attorney, both on July 17, 2018.

/s/ JOHN BENNETT
John Bennett